(2)

03-1234

Supreme Court, U.S.
FILED
MAY 3 - 2004
OFFICE OF THE CLERK

In the Supreme Court of the United States

MID-CON FREIGHT SYSTEMS, INC.
and LAFOND EXPRESS, INC.,

Petitioners,

v.

MICHIGAN PUBLIC SERVICE
COMMISSION, ET AL

Respondents.

On Petition For Writ of Certiorari
To The Michigan Court of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
P. O. Box 30212
525 W. Ottawa Street
Lansing, Michigan 48909
(517) 373-1124
Counsel of Record

Henry J. Boynton
Assistant Solicitor General

David A. Voges
Emmanuel B. Odunlami
Assistant Attorneys General
Attorneys for Respondents

QUESTIONS PRESENTED

Under MCL 478.2(2), motor carrier vehicles base-plated in Michigan that engage entirely in interstate commerce pay an annual fee of $100 for the administration of the Michigan Motor Carrier Act and other Acts related to the safety of Michigan's highways. Petitioners assert that MCL 478.2(2) is preempted by 49 USC 11506 that provides for the annual registration of a federal certificate and proof of insurance. Based on the record before it, the Michigan Court of Appeals found the $100 fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the Michigan Motor Carrier Act, particularly covering costs of enforcing safety regulations.

The questions presented are:

Whether the Michigan Court of Appeals correctly concluded that the $100 fee required by MCL 478.2(2) for interstate vehicles that are licensed in Michigan was not preempted by federal law.

Where the Petitioners failed to present evidence to support their claims, did the Michigan Courts properly grant summary disposition against them?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Michigan Court of Appeals were Westlake Transportation, Inc., Vanderkooi Carriers, Inc., El Toro Motor Freight, Inc., Myriah, Inc., Prism, Inc., Gerrigs Trucking & Leasing, Inc., Best Way Express, Inc., Troy Cab, Inc., Deeco Services, Inc., d/b/a Deeco Transportation, Tiberio Frank, d/b/a Fairfield Towing, Elex, Inc., d/b/a Lafond Express, Dale Constine & Sons, Inc., Calcut Sales & Services, Inc., d/b/a Calcut Trucking Company, Ambassador Transportation, Inc., Hawkins Steel Cartage, Inc., Midcon Freight Systems, Inc., JLH Transfer, Inc., H & H Enterprises, Inc., d/b/a S & M Cartage, Inc., Central Transport, Inc., Bancroft Trucking Company, US Truck Company, Inc., West End Cartage, Inc., Central Cartage Company, CTX, Inc., Mohawk Motor Michigan, Inc., Economy Transport, Inc., McKinlay Transport Limited, Mason & Dixon Lines, Inc., Universal Amcan Limited, Romeo Expediters, Inc., Tom Thumb Services, Inc., d/b/a REI, OJ Transport Company, JLAW Enterprises, Inc., OJ Transport, Inc., Michigan Public Service Commission, Michigan Department of Treasury, Michigan Department of Commerce, the State of Michigan, American Trucking Associations, Inc., and TNT Holland Motor Express, Inc. Petitioner TNT Holland Motor Express, Inc. has since become USF Holland, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

1. Statutory Framework 2
2. Court Proceedings 3
   a. Michigan Court of Claims 3
   b. Michigan Court of Appeals. 4
   c. Michigan Supreme Court 5

REASONS FOR DENYING THE PETITION 6

A. The Michigan Motor Carrier Act's fee provisions are not preempted by federal law. 6
   1. Introduction. 6
   2. MCL 478.2(2) is not subject to federal preemption unless that is the clear and unequivocal intention of Congress. 7
   3. 49 USC 11506 does not preempt the fee charged under MCL 478.2(2). 8
   4. Federal regulations do not preempt MCL 478.2(2) 11
   5. Nothing in the legislative history evidences an intent of Congress that the registration standards authorized by 49 USC 11506 preempt state regulatory fees. 13

B. The State court precedents relied upon by Petitioners do not support the conclusion that 49 USC 11506 preempts MCL 478.2(2)..... 14

C. The issue presented does not warrant this Court's review..... 18

D. Under Michigan Court Rule 2.116(c)(10), summary disposition is properly granted where a party opposing such a motion failed to present evidence to support its claim. 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Anderson v Kemper Insurance Co,
128 Mich App 249; 340 NW2d 87 (1983) 23

Cipollone v Ligget Group, Inc,
505 US 504 (1992) 8

Duprey v Huron & E R Co, Inc,
237 Mich 662; 604 NW2d 702 (1999) 18

Durant v Stahlin,
375 Mich 628; 135 NW2d 392 (1965) 23

Florida Avocado Growers, Inc v Paul,
373 US 132 (1963) 3

Louisiana Public Service Comm v Federal Communications Comm,
476 US 355 (1986) 8

Maiden v Rozwood,
461 Mich 109; 597 NW2d 817 (1999) 22

New York v FERC,
535 US 1 (2003) 18

Owner-Operator Independent Driver's Ass'n, Inc v Idaho Public Utilities Comm,
125 Idaho 401; 871 P2d 818 (1994) 15

Pacific Gas & Electric Co v California Energy Resources Conservation and Development Comm,
461 US 190 (1983) 8

Remes v Dobys,
87 Mich App 534; 274 NW2d 64 (1978) 23

Rice v Santa Fe Elevator Corp,
321 US 218 (1947) 18

Roadway Express Inc v State Treasurer,
120 Ill App 3d 133; 458 NE2d 66 (1983) 14

Smith v Globe Life Ins Co,
460 Mich 446; 597 NW2d 28 (1999) 23

Spiek v Dept of Transportation,
456 Mich 331; 572 NW2d 201 (1998) 22

State Ex Rel Sammons Trucking, Inc v Boedecker,
158 Mont 397; 492 P2d 9919 (1972) 14, 15

State Ex Rel Sammons Trucking, Inc v Bollinger,
169 Mont 88; 544 P2d 1235 (1976) 15

Westlake Transportation, Inc v Michigan Public Service Comm,
255 Mich App 589; 662 NW2d 784 (2003) 1

Yellow Transportation v Michigan,
537 US 36 (2002) 19

Statutes

28 USC 1257 1

49 USC 113(f)(1) 3

49 USC 11506 (1988 ed) (repealed) 2

49 USC 11506 (1994 ed) (repealed) 2

49 USC 11506(a) 3

49 USC 11506(c)(2)(B)(iv) 19

49 USC 14504 3

49 USC 14504 (2000 ed) 2

MCL 257.1, *et seq* 10

MCL 257.801(1)(j) 11

MCL 257.801(1)(k) 11

MCL 257.801g 11

MCL 478.2(1) 2

MCL 478.7(4) 17

MCL 480.11, *et seq* 6, 10

Other Authorities

61 Fed Reg 54706, 54707 (1996) 2

Rules

H R Rep No. 253, 89th Cong.
1st Sess., *reprinted in* 1965 USCCAN 2923, 2924 13

Pub L 89-170, 79 Stat 648 (September 6, 1965) 13

S Rep No. 387, 89th Cong., Sess. 4-5 (1965) 14

Regulations

49 CFR 1023 16

49 CFR 1023.11 11

49 CFR 1023.21 11

49 CFR 1023.31 11

49 CFR 1023.32(a) 11

49 CFR 1023.33 11

Constitutional Provisions

US Const, art VI, cl 2 1

OPINIONS BELOW

The opinion of the Michigan Court of Appeals (Pet. App. 1-35) is reported as *Westlake Transportation, Inc v Michigan Public Service Comm*, 255 Mich App 589; 662 NW2d 784 (2003). The trial court rulings (Pet. App. 36-72) and the judgment of the Michigan Supreme Court denying leave to appeal (Pet. App. 73-75) are all unreported.

JURISDICTION

The Michigan Court of Appeals decision was entered on March 11, 2003. The judgment of the Michigan Supreme Court denying Petitioners' Application for Leave to Appeal was entered December 3, 2003. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, art VI, cl 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof. . . shall be the supreme Law of the Land. . . and the judges in every State shall be bound thereby, anything in the Constitution or the Law of any State to the Contrary notwithstanding.

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

MCL 478.2(2) provides:

(2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle.

Relevant statutory provisions reproduced in the Appendix are 49 USC 11506 (1988 ed) (repealed) (Pet. App. 76-77); 49 USC 11506 (1994 ed) (repealed) (Pet. App. 78-81); and 49 USC 14504 (2000 ed) (Pet. App. 82-85).

STATEMENT

1. Statutory Framework

Since 1933, motor carrier regulation in Michigan has been under the Michigan Motor Carrier Act (MCA), MCL 475.1, *et seq*. Under the MCA, most motor carriers are required to pay an annual fee of $100 per vehicle for the administration of the act. MCL 478.2(1) and (2). Subsection 1 applies to motor carrier vehicles that operate intrastate pursuant to a certificate of authority, while subsection 2 applies to motor carrier vehicles base-plated in Michigan that engage entirely in interstate commerce. Interstate vehicles base-plated outside of Michigan are charged a fee of up to $10 for registering their Interstate Commerce Commission[1] (ICC) certificate and proof of insurance. MCL 478.7.

[1] Congress abolished the ICC in 1995 and assigned responsibility for administering the new Single State Registration System to the Secretary of Transportation. See ICC Termination Act of 1995, Pub L 104-88, § 101, 109 Stat 803. The Federal Highway Administration, under the Secretary of Transportation, adopted the ICC regulations that implemented the Single State Registration System, 61 Fed Reg 54706, 54707 (1996), and the Federal Motor Carrier Safety Administration now has authority to administer the system, 49 USC 113(f)(1) [49 USCS 113(f)(1)].

Petitioners claim that MCL 478.2(2) is preempted by the federal Single State Registration System (SSRS), 49 USC 11506[2], and federal regulations. In the SSRS, Congress provided that a motor carrier having interstate authority must annually register its federal certificate and proof of insurance with only one of the states where it is authorized to provide service. Under 49 USC 11506, the SSRS is deemed to satisfy the registration requirement of all other states, except for a nominal fee of "not to exceed $10 per vehicle" that is permitted to be charged by each state participating in the SSRS. The scope of the standards authorized by 49 USC 11506 relate to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. See, 49 USC 11506(a). The standards enumerated are (1) filing and maintaining ICC certificates; (2) registering motor vehicles; (3) filing proof of insurance; and (4) filing the same of a local agent for service of process. 49 USC 11506(b) further provides that it is not an unreasonable burden for a state to require a motor carrier subject to ICC jurisdiction to register with that state.

The Michigan Court of Claims, the Michigan Court of Appeals, and the Michigan Supreme Court have all considered Petitioners' claim that the limitation of § 11506 on registration fees also limits the regulatory fees under MCL 478.2(2). None of these courts have found any merit to Petitioners' claims.

2. Court Proceedings

a. Michigan Court of Claims

In *Westlake, et al*, Docket No. 95-15628-CM and *Troy Cab, et al*, Docket No. 95-15631-CM, Westlake and Troy Cab both challenged the lawfulness of the collection of fees pursuant to the

[2] This statute is currently codified as 49 USC 14504; however, Respondents will refer to the law as § 11506.

MCA. These cases were certified as a class action on June 9, 1995.

On June 22, 1995, Westlake Transportation, Inc. filed a motion for partial summary disposition asserting that MCL 478.2(2) was preempted by 49 USC 11506. On October 13, 1998, the Court of Claims issued its Opinion, finding that Petitioners' motion was without merit and denied the motion (Pet. App. 36-50). On December 30, 1998, the Court granted the State Defendants' Motion for Summary Disposition (Pet. App. 54-56). On March 7, 2000, the Court denied Plaintiffs' Motion for Reconsideration (Pet. App. 57-77). Petitioners filed a claim of appeal with the Michigan Court of Appeals on March 24, 2000.

b. Michigan Court of Appeals.

On March 11, 2003, the Court of Appeals issued its opinion in the consolidated appeals and affirmed the Court of Claims summary disposition ruling in favor of the State Defendants. The Court stated:

> Plaintiffs argue that the federal statutory language is clear – a state may charge a maximum registration fee of $10 a vehicle to motor carriers engaged in interstate commerce, regardless of whether a motor carrier is registered in Michigan or another state. Plaintiffs acknowledge that MCL 478.7 reflects the mandate of § 11506 with regard to motor carriers registered out of state, [fn with text of MCL 478.7 is omitted] and asserts that motor carriers registered in Michigan are required to be charged similarly.
>
> * * *
>
> [T]he key questions are (1) to whom does the fee limit in § 11506 apply, and (2) to what type of fees. The answers to these questions can be found in the language of the statute itself and the federal regulations which interpret it.
>
> * * *

> We find that the statutory language and its accompanying federal regulations are clear. A registration state is simply a participating state in which a motor carrier is registering. Therefore, when the statute states that a participating state may not charge a fee in excess of $10, this includes the registration state. To conclude otherwise, that a registration state could set its own fee, would contravene the express language and purpose of the statute.
>
> The next question is whether the $100 fee in MCL 478.2(2) is a registration fee, such that it is subject to the limitation in § 11506, or a regulatory fee. . . .
>
> We find that the $100 interstate fee could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations. [fn concerning waiver of fee is omitted] If the purpose of a fee is to regulate an industry or service, it can be properly classified as a regulatory fee. *Bolt v City of Lansing*, 459 Mich 152, 161-162; 587 NW2d 264 (1998). Because the fee in MCL 487.2(2) is not a registration fee, it is not subject to preemption by 49 USC 11506.

Petitioners filed an Application for Leave to Appeal with the Michigan Supreme Court on April 1, 2003.

c. Michigan Supreme Court

On December 3, 2003, the Michigan Supreme Court denied the applications for leave (Pet. App. 74-75).

REASONS FOR DENYING THE PETITION

A. The Michigan Motor Carrier Act's fee provisions are not preempted by federal law.

1. Introduction.

Under MCL 478.2(2), motor carrier vehicles that are base-plated in Michigan and engage entirely in interstate commerce are assessed an annual fee of $100 for the administration of the MCA. Petitioners claim that MCL 478.2(2) is preempted by 49 USC 11506 and federal regulations. In the SSRS, Congress provided that a motor carrier having interstate authority must annually register its ICC authority and proof of insurance with only one of the states where it is authorized to provide service. Under § 11506, this single registration is deemed to satisfy the registration requirement of all other states, except for a nominal fee of "not to exceed $10 per vehicle" that is permitted to be charged by each participating state.

The scope of the standards authorized by § 11506 relate only to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. The standards enumerated are (1) filing and maintaining ICC certificates; (2) registering motor vehicles; (3) filing proof of insurance; and (4) filing the name of a local agent for service of process. Section 11506(b) further provides that it is not an unreasonable burden for a state to require a motor carrier subject to ICC jurisdiction to register with that state.

The fundamental flaw in the Petitioners' argument is that the *regulatory* fee provided for in MCL 478.2(2) is not a requirement to prove an interstate carrier is properly certified under federal authority or that its motor vehicles are legally registered or that the carrier is insured or that it has a named agent for service of process. Rather, the fee supports the enforcement of the MCA; the Motor Carrier Safety Act, MCL 480.11, *et seq*; the Michigan Vehicle Code, MCL 257.1, *et seq*; size and weight regulation; and other laws governing commercial motor vehicles and motor

carriers.[3] Hence, it is a fee to cover the cost of regulation and is not the type of fee addressed by § 11506.

2. MCL 478.2(2) is not subject to federal preemption unless that is the clear and unequivocal intention of Congress.

Petitioners claim MCL 478.2(2) has been preempted by federal law. In addressing this preemption claim, the Michigan Court of Appeals summarized the source and scope of federal preemption as follows:

> Plaintiffs argue that MCL 478.2(2) is preempted by federal law, specifically 49 USC § 11506. Determining whether federal law preempts a state law presents an issue of statutory construction and is a question of law. *Kohynenbelt v Flagstar Bank*, 242 Mich App 21, 27; 617 NW2d 706 (2000). Congressional intent is the cornerstone of preemption analysis. *Fort Halifax Packing Co v Coyne*, 482 US 1, 8; 107 S Ct 2211; 96 L Ed 2d 1 (1987).
>
> The Supremacy Clause of the United States Constitution provides Congress with the power to preempt state law. US Const, art 6, cl 2. A general presumption exists in the law against federal preemption. *Duprey v Huron & Eastern R Co, Inc*, 237 Mich App 662, 665; 604 NW2d 702 (1999). Federal preemption occurs only under certain conditions, such as when (1) Congress enacts a federal statute that expresses a clear intent to preempt state law, (2) an outright or actual conflict exists between federal and state law, (3) compliance with both federal and state law is effectively impossible, (4) an implicit barrier to state regulation exists in federal law,

---

[3] See September 14, 1995 Affidavit of Thomas R. Lonergan ¶ 16 (Res. App. 10b) and Affidavit of Captain Timothy J. Yungfer ¶¶ 2-12 (Res. App. 30b-32b).

(5) Congress has legislated comprehensively, thereby occupying an entire field and leaving no room for supplemental state law, or (6) the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Id.* (Pet. App. 6-7).

Thus, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm,* 476 US 355, 369 (1986). Furthermore, as the U.S. Supreme Court noted in *Cipollone v Ligget Group, Inc,* 505 US 504, 517 (1992), "[c]ongress' enactment of a provision defining the preemptive reach implies that matters beyond that reach are not pre-empted."

State regulatory power will not be deemed preempted by federal regulation unless Congress has "unmistakably so ordained". *Florida Lime and Avocado Growers v Paul,* 373 US 132, 142 (1963). Significantly, an express intent to nullify a state regulatory program will not be lightly inferred. *Pacific Gas & Electric Co v California Energy Resources Conservation and Development Comm,* 461 US 190 (1983).

As discussed below, Petitioners have failed to carry their heavy burden to demonstrate that the regulatory fees collected pursuant to MCL 478.2(2) are preempted under these principles of constitutional law.

3. 49 USC 11506 does not preempt the fee charged under MCL 478.2(2).

49 USC 11506 provides, in relevant part, as follows:

(2) Specific requirements. –

(A) **Evidence of certificate; proof of insurance; payment of fees.** – Under the amended standards implementing the single State registration system

described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier holding a certificate or permit issued under this subtitle –

(i) to file and maintain evidence of such certificate or permit;

(ii) to file satisfactory proof of required insurance or qualification as a self-insurer;

(iii) to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and

(iv) to file the name of a local agent for service of process.

(B) **Receipts; fee system.** – such amended standards –

* * *

(iv) shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

The scope of the standards authorized by § 11506 relates only to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. The standards enumerated are (1) filing and maintaining ICC certificates; (2) registering motor vehicles; (3) filing proof of

insurance; and (4) filing the name of a local agent for service of process.

Consistent with § 11506, interstate vehicles base-plated outside of Michigan are charged a fee of up to $10 for registering their ICC certificate and proof of insurance. MCL 478.7. However, if an interstate vehicle is base-plated in Michigan, then MCL 478.2(2) is applicable, which provides as follows:

> (2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce. A motor carrier shall pay a fee of only $50.00 for each self-propelled motor vehicle operated by or on behalf of the motor carrier if the motor carrier begins operation of the vehicle after June 30 and has not previously paid a fee under this subsection for that vehicle.

The *regulatory* fee provided for in MCL 478.2(2) is not just a requirement to prove an interstate carrier is properly certified under federal authority or that its motor vehicles are legally registered or that the carrier is insured, or that it has a named agent for service of process. Rather, the fee under MCL 478.2(2) supports the MCA; the Motor Carrier Safety Act, MCL 480.11, *et seq*; the Michigan Vehicle Code, MCL 257.1, *et seq*; and the Fire Prevention Act, MCL 29.1, *et seq*.[4] Section 11506 seeks to provide the motor carrier with the benefit of registering their ICC authority in one state, for each of the states for which they have authority. Thus, MCL 478.2(2) literally is not within the preemptive scope of § 11506.

---

[4] See September 14, 1995 Affidavit of Thomas R. Lonergan ¶ 16 (Res. App. 10b) and Affidavit of Captain Timothy J. Yungfer ¶¶ 2-12 (Res. App. 30b-32b).

Petitioners' reliance on the language in 49 USC 11506(b) is misplaced. That provision states: "When a State registration requirement imposes obligations in excess of the standards, the part in excess is an unreasonable burden." The reference to 'State registration requirement' relates to the registration by a motor carrier of their ICC authority. It is wholly unconnected to the base-plated registration which is based on a state's motor vehicle code or the international registration plan. This distinction is further evident when one reviews the fee system utilized for the SSRS. The fee system is based on the number of commercial motor vehicles the carrier operates in a State, which is not to exceed $10.00 per vehicle. In contrast, the licensing/plating registration of a motor vehicle is usually based on the weight of a vehicle. (See MCL 257.801(1)(j) or MCL 257.801(1)(k) or MCL 257.801g).

The MCL 478.2(2) regulation fee is not encompassed within the limitations of § 11506.

4. Federal regulations do not preempt MCL 478.2(2).

Petitioners claim that certain pre-SSRS federal regulations imposed an absolute limit, "not to exceed" $5 initially and later $10, on all interstate decal fees, including those required by the state that registers and license plates a motor carrier's vehicles.

The federal registration and identification standards that Petitioners allege preempt MCL 478.2(2) simply do not purport to preempt state *regulatory* fees.

By their terms, the standards apply only when a state requires that a motor carrier "file and maintain a current record of its authority issued by the Interstate Commerce Commission" (49 CFR 1023.11); "designate a local agent for service of process..." (49 CFR 1023.21); or "identify its vehicles as operating under its ICC authority." (49 CFR 1023.31). As for 49 CFR 1023.32(a) and 1023.33 these regulations provide, in pertinent part, that:

> [a] motor carrier shall apply to [a] State for the issuance of an identification stamp or stamps.... For the registration and identification of the vehicle or vehicles which it intends to operate . . . within the borders of such State. . .
>
> * * *
>
> The application ... shall be accompanied by the fee, if any, prescribed by the law of such State; provided, however, that such fee shall not exceed $10.00 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps) that such fee shall not exceed $10.00 for each vehicle operated under the authority of the motor carrier.

In affirming the Court of Claims on this issue, the Michigan Court of Appeals stated:

> The pre-1994 federal regulation substantively mirrored subsection 11506(c) as amended in 1994. Because we concluded that the interstate fee is a regulatory fee, it is outside the scope of the federal law and was not preempted.[8] Accordingly, the court did not err in granting defendants summary disposition.

---

[8] We note that cases from other jurisdictions that plaintiffs cite are inapplicable in this case. The conclusion in this case turns on whether the interstate fee is classified as a regulatory fee or a registration fee. In the cases plaintiffs cite, there was no disagreement that the fee at issue was a registration fee.

In the foregoing circumstances, federal standards control and contrary state standards are preempted. None of these circumstances, however, relate to *regulatory* fees. In sum, nothing in the federal standards, their underlying statute, or

legislative history suggest that Congress intended to preempt the States in matters unrelated to proof of legality of interstate operations. A regulatory fee is simply not subject to preemption under the regulations cited by Petitioners.

5. Nothing in the legislative history evidences an intent of Congress that the registration standards authorized by 49 USC 11506 preempt state regulatory fees.

Section 11506 was amended in 1965 in response to a need to control illegal interstate for-hire trucking. Pub L 89-170, 79 Stat 648 (September 6, 1965). The House noted that such illegal operators represented a "continuing concern" and that despite past legislative activity, "illegal for-hire trucking continues to be a significant problem today". H R Rep No. 253, 89th Cong. 1st Sess., *reprinted in* 1965 USCCAN 2923, 2924. Much of the remedy for this problem was addressed by adoption of additional civil enforcement provisions to be used by the ICC. In addition, there was an acknowledgment that states had attempted to help control the problem by requiring registration of ICC authorized carriers, but there was no uniformity in such state requirements. Hence, uniformity would be required. *Id.* It was specifically noted that the federal standards to be adopted under 49 USC 11506 were "to evidence the lawfulness of interstate operations of a carrier within a state. . . ." *Id* at 2928.

There is no basis for the proposition that state regulatory fees were to be considered "proof of legality of interstate operations". Indeed, it was specifically noted that:

> the purpose of such registration is to enable state enforcement officials to identify motor carriers hauling, on a for-hire basis, commodities subject to regulation and thus take on-the-spot action against those who have not the authority to do so. This, in effect, means that we want to encourage the states in helping the ICC keep unlawful interstate motor carriers off the highway. (111 Cong. Rec. 9672 (May 6, 1965) (statement of Rep. Harris,

> Chairman, Committee on Interstate and Foreign Commerce.)

Nothing here justifies the argument that Congress intended to deprive the states of their ability to otherwise regulate in the public interest, or to prevent the states from assessing regulatory fees.

The Senate was consistent in its characterization of its version of the legislation, noting that the standards defined therein were to "evidence the lawfulness of interstate operations of a carrier", by registration of ICC certificates, proof of insurance and designation of agents for service of process. S Rep No. 387, 89th Cong., Sess. 4-5 (1965) at 4-5.

It is readily apparent that the need for registration and identification requirements to be uniform was to assist the federal and state governments in addressing the problem of uncertificated, illegal interstate operators, not to eliminate fee-funded state regulatory programs.

B. The State court precedents relied upon by Petitioners do not support the conclusion that 49 USC 11506 preempts MCL 478.2(2).

Petitioners cite *State Ex Rel Sammons Trucking, Inc v Boedecker,* 158 Mont 397; 492 P2d 9919 (1972) as support for the following proposition:

> Congress has pre-empted the field of state regulation and identification of interstate motor vehicles using Montana highways. (Pet. 18).

This quotation, however, is wholly inconsistent with the well-established principle that Congress has not preempted the field of state regulation of interstate motor vehicles. *See, Roadway Express Inc v State Treasurer,* 120 Ill App 3d 133; 458 NE2d 66

(1983). In *Roadway,* the court held that Congress, in choosing to regulate transportation through the Interstate Commerce Act, did not intend to preempt the field of regulation. 458 NE2d at 68. *Sammons* involved a challenge to certain Montana identification, registration and licensing procedures for motor vehicles. It was argued that these Montana procedures imposed greater and conflicting requirements than the SSRS its regulations that limited state registration fees to $5.00 per vehicle [since increased to $10.00]. Yet, *Sammons* did not involve any discussion of a *regulatory* fee. The issue addressed there related solely to the state's *registration* fee, which Montana had failed to reduce from $10.00 to $5.00 as required by the new federal regulation. In *Sammons*, the Court held, as to the *registration* fee, that the Montana Commission was bound by the federal limitation on the amount of the registration/fee that could be charged. The ruling is not applicable to this appeal because *Sammons* in no way addressed the question of a state's power, as then expressly recognized by ICC regulations, to charge per vehicle *regulatory* fees in addition to the federally limited registration fee.

Petitioners also cite to *State Ex Rel Sammons Trucking, Inc v Bollinger,* 169 Mont 88; 544 P2d 1235 (1976). This case reviewed the Montana legislature amending its $10.00 registration fee to $5.00, so as to comply with federal law and the earlier *Sammons Trucking* case. The amendment also redefined "motor vehicle" to include any trailer, semi-trailer or dolly attached to a motor vehicle. Each "vehicular unit" became subject to the $5.00 registration fee. The Montana Supreme Court found this provision conflicted with the federal motor carrier regulations that limited the definition of motor vehicle to vehicles having a mechanical drive unit. The federal definition of motor vehicle, in conjunction with the federal $5.00 per vehicle fee maximum, clearly conflicted with the Montana legislation that

would have imposed registration fees substantially in excess of that permitted by the federal regulation.[5]

Petitioners also cite *Roadway Express, Inc v State Treasurer, supra*. *Roadway* held that the Illinois Commerce Commission possessed the power to adopt the resolution that imposed the fee exceeding the federal limit and was not preempted by Congress from doing so. 458 NE2d at 68. The court observed that the federal maximum of a $5.00 fee [now $10.00] for issuance of an identification stamp, according to the federal statute itself:

> [S]hall not preclude a state from imposing an **additional fee** in a reasonable amount to be paid to a State commission ... if such additional fee shall be subject to exclusive use by the State's commission and used by it solely for defraying the cost of the **regulation** of carriers by highway operating within the borders of such state and the enforcement of laws pertaining thereto. ... 458 NE2d at 69 [emphasis added].

The *Roadway Express* court carefully reviewed the statutes that defined the purposes for which that state's Motor Vehicle Fund could be expended. The Court then found that such purposes

---

[5] Petitioners cite *Owner-Operator Independent Driver's Ass'n, Inc v Idaho Public Utilities Comm*, 125 Idaho 401; 871 P2d 818 (1994), which involved a trial court decision that part 1023 of the ICC regulations (49 CFR 1023) could be interpreted to permit a maximum annual registration fee of $20.00, instead of $10.00. The decision turned on the fact that Idaho statutes required the Idaho Public Utility Commission to charge a $25.00 Idaho registration fee on all interstate vehicles regardless of where they were license plated, which clearly exceeded the $10.00 federal maximum registration fee. The facts of that case are not at all like those presented here, which do not involve anything like the combining of separate federal maximums that characterized the Idaho case. Moreover, just like the other cases discussed above, and cited by the Petitioners, the case never considered whether Idaho was preempted from charging regulatory fees in addition to registration and/or vehicle identification fees.

included regulation of commercial relocators/repairs and maintenance of highways, and that the fund was thus not used exclusively for the regulation of highway carriers. Consequently, Illinois did not comply with the federal condition to imposition of an additional regulatory fee. 458 NE2d at 69, 70. Petitioners' reliance on *Roadway Express*, however, misses the mark. That case not only involved circumstances dissimilar to those at bar, but does not advance the holding advanced by the Petitioners, which was specifically rejected by the Court of Appeals. (Pet. App. 19, n 8).

Further, it should be noted that *Roadway Express* involved a state-imposed identification stamp fee that clearly exceeded the federal maximum. In contrast, the Michigan fees disputed by Petitioners do not involve identification fees or registration fees. Such regulatory fees are not addressed in any of Petitioners cited cases. Moreover, it cannot be too often reiterated that Michigan's regulatory fee, under MCL 478.2(2), is not, like its federally-approved $10.00 registration fee, applied to all interstate vehicles in Michigan. This regulatory fee is applied only when actual vehicular "presence" in Michigan is demonstrated, by commercially license plating the fee paying vehicle in this state. The Court of Claims recognized Petitioners' confusion of the issue by noting that Michigan has complied with the SSRS through MCL 478.7(4) and that MCL 478.2(2) is unrelated to the purpose of the SSRS. (Pet. App. 46).

Finally, in affirming the Court of Claims, the Court of Appeals stated that the issue turned on whether the interstate fee is classified as a regulatory fee or a registration fee, since a regulatory fee is plainly outside the scope of the federal law discussed (Pet. App. 16). A significant portion of the Petition fails to acknowledge the distinction between regulatory and registration fees, which distinction is well recognized in the law. The extensive safety regulation, insurance monitoring, certification process and extensive litigation, constitutes real regulation in furtherance of the non-preempted portions of the

Michigan Motor Carrier Act and Rules. Such activities are funded by the regulatory fees at issue here.

C. The issue presented does not warrant this Court's review.

The Petitioners assert that the issue in this case is important, but do so based on erroneous, speculative and exaggerated claims. For example, the Petitioners, without citation, erroneously claim that the Michigan Court of Appeals approached this case with an ill-conceived "presumption against federal preemption" which, according to the Petitioners, colored the Court's views. (Pet. 20). To the contrary, the Michigan Court of Appeals plainly followed the preemption precepts laid down by this Court. This is demonstrated by reference to Michigan Court of Appeals opinion itself. (Pet. App. 6- 7).

In its preemption analysis the Michigan Court of Appeals cites an earlier opinion in *Duprey v Huron & E R Co, Inc*, 237 Mich 662; 604 NW2d 702 (1999), which in turn references this Court's decisions in *Rice v Santa Fe Elevator Corp*, 321 US 218 (1947). *Rice* is cited for the proposition that there exists a general presumption against federal preemption. This statement is clearly in-line with the statement in *Rice*, at 230, that "we start with the assumption that the police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." In any event, the vitality of the concept of a presumption against federal preemption cannot seriously be questioned in light of this Court's decision in *New York v FERC*, 535 US 1 (2003). In that case the Federal Energy Regulatory Commission (FERC) issued an order that required utilities to unbundle (i.e., separate) transmission costs from energy costs in its retail sales. New York contended that the FERC did not have any jurisdiction to issue an order that regulated retail sales. In determining whether the FERC order was preemptive this Court addressed New York's assertion that there was a presumption against preemption. *Id.* at 18. This Court, however, indicated that since the case involved the defining of the proper scope of the federal agency's power such a presumption against preemption did not apply. *Id.* The instant

case, by contrast, does not involve the defining of a federal agency's power because neither action by nor an order of a federal agency is at issue. Thus, far from being the ill-conceived opinion the Petitioners claim it to be, the Michigan Court of Appeals opinion correctly states and follows this Court's preemption precepts. Additionally, it should be noted that in undertaking its analysis of the preemption claims the Michigan Court of Appeals had the benefit of this Court's decision in *Yellow Transportation v Michigan*, 537 US 36 (2002), that specifically addressed a preemption claim under the SSRS and which the Michigan Court of Appeals quotes in its opinion.

Having mischaracterized the Michigan Court of Appeals opinion as inconsistent with this Court's holdings regarding preemption, the Petitioners proceed to claim that the opinion creates a "loophole." This argument by Petitioners is supported only by numerous, speculative and exaggerated claims that have no support in the record. An examination of these claims establishes that they are without merit.

The Petitioners' first claim that the 'regulatory fee' approach, if adopted by other States, poses a significant threat to Congress's goal of reducing regulatory burdens imposed on interstate motor carriers. (Pet. 20). The law and the record, however, contradict this claim. First, the intent of Congress in enacting the SSRS was to eliminate the burdens associated with the multiple state registration of an interstate carrier's federal authority, and also to establish a fee system to minimize the cost of filing a proof of insurance. 49 USC 11506(c)(2)(B)(iv). Secondly, the Petitioners overlook the fact that the regulatory fee charged by MCL 478.2(2) applies only to those interstate motor vehicles that are base-plated in Michigan. The regulatory fee does not apply to all interstate motor vehicles as the Petitioners' claim appears to suggest. Thus, while Congress did, with the enactment of the SSRS, preempt a State from charging more than $10 to register and operate within the borders of that State, it did not concurrently preempt the State from charging a regulatory fee to those interstate vehicles that are base-plated in that State.

Further, the claim that the State regulatory fee charged to an interstate motor vehicle base-plated in that State will lead to a quagmire of State regulatory fees clearly overstates the degree of preemption contained in federal law. Simply put, the SSRS was not intended, and did not, relieve a motor carrier from paying any and all State fees related to the registering and plating of motor carrier vehicles. States may still charge a registration fee, limited to $10, and may still charge a regulatory fee to motor vehicles that are base-plated in that State. The States, as the record shows, have significant regulatory obligations to supervise and regulate the safety of motor carrier operations. See Affidavit of Thomas R. Lonergan, ¶ 16 (Res. App. 10b) and Affidavit of Timothy J. Yungfer, ¶¶ 2-12 (Res. App. 30b-32b).

The Petitioners then claim that the validity of a regulatory fee is based on little more than wordplay. Petitioners argue that, because the statute does not suggest any particular or special "regulatory" purpose for the charge, the fee is invalid. The finding by the Michigan Court of Appeals was that the fee prescribed by MCL 478.2(2) "could reasonably be classified as a regulatory fee because it is a fee imposed for the administration of the MCA, particularly covering costs of enforcing safety regulations." Pet. App. 16. This finding was entirely consistent with the evidence placed on the record. Affidavit of Thomas R. Lonergan, ¶ 16 (Res. App. 10b) and Affidavit of Captain Timothy J. Yungfer ¶¶ 2-12 (Res. App. 30b-32b). The Petitioners, however, criticize the Michigan Court of Appeals arguing that it based its regulatory fee finding on a broad statement by an MPSC employee. The point here is that if the Petitioners had contested that MPSC employee statement, they had ample opportunity to present contrary evidence to the trial court to support their claim. The plain fact is that they chose not to do so. The Petitioners should not be heard now to complain about the findings of the Michigan Court of Appeals when they failed to present evidence to the trial court to support their claims. The Petitioners then state: "[t]he Opinion below invites each of the 39 SSRS states to increase its $10 fee by any amount . . . will be at the mercy of revenue seeking state legislators." (Pet. 22). Again, this is

nothing more than the Petitioners' opinion since they point to no factual basis for this claim. They also continue to ignore the distinction between vehicles base-plated in Michigan and those base-plated in other states.

Petitioners next make the assertion "the decision permits state regulatory commissions to increase state motor carrier costs without any real, practical justification." (Pet. 23). Petitioners make this assertion despite the fact that the Michigan legislature, not the Michigan Public Service Commission, determines the regulatory fees to be charged to both intrastate and interstate carriers. The Petitioners continue by questioning whether Michigan-plated vehicles have "a greater Michigan 'presence' than vehicles plated elsewhere." (Pet. 23). This is followed immediately by the sentence, "In fact, just the opposite is likely true." (Pet. 23). This sentence clearly illustrates the bind Petitioners now find themselves in because they waived the opportunity to present evidence to the trial court to support their claims. Certiorari should not be granted on unproven factual claims that Petitioners claim are "likely true." Again, Petitioners point to no evidence in the record to support their claim. Petitioners also offer the hypothetical of a small "mom and pop" carrier with a Michigan office, but "virtually no Michigan presence at all." (Pet. 24). This is an exaggerated example since this small Michigan carrier apparently provides transportation in other states and never provides transportation in Michigan. Again, this hypothetical finds no support in the record. While Petitioners assert the MCL 478.2(2) fee is "burdensome, and costly" it notes that a large Michigan based carrier with significant Michigan operations avoids paying the fee entirely by transferring its operational records out of state. (Pet. 23). Thus the Petitioners appear to be asserting either the interests of large carriers that do not pay the fee or small mom and pop carriers that do not exist. In any event, the Petition does not present an issue that warrants this court's review.

D. Under Michigan Court Rule 2.116(c)(10), summary disposition is properly granted where a party opposing such a motion failed to present evidence to support its claim.

In presenting its case at the state level, the Petitioners failed to present evidence in support of its claim that the MCL 478.2(2) is preempted by federal law. As a result, the trial court properly granted summary disposition to the Respondents pursuant to Michigan Court Rule (MCR) 2.116(C)(10).[6]

In the Michigan trial courts, a motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed de novo by Michigan courts on appeal. *Spiek v Dept of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), the Michigan Supreme Court addressed the legal standard under which motions brought pursuant to MCR 2.116(C)(10) are to be decided:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(5).
>
> A litigant's mere pledge to establish an issue of fact at

---

[6] MCR 2.116(C)(10) provides:

> Except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

> trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial.
>
> Today we clarify the correct legal standard under MCR 2.116(C)(10) because our Court has inconsistently applied the standard since the 1985 amendment of the court rules. The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. [Citations omitted.]

Thus, even if the Petitioners had stated a *prima facie* case when before the trial court, it was also required to show the existence of a genuine issue of material fact that is based on something more than mere conjecture. The Petitioners failed to make this showing. *Durant v Stahlin*, 375 Mich 628, 638; 135 NW2d 392 (1965); *Anderson v Kemper Insurance Co*, 128 Mich App 249, 252-253; 340 NW2d 87 (1983). Therefore, under the Michigan Court Rules, a party, when challenged, must show that it has a case on the law *and* that there is some evidentiary proof of specific facts to support its allegations. *Durant* at 638; *Remes v Dobys*, 87 Mich App 534, 537-538; 274 NW2d 64 (1978). If a party opposing a MCR 2.116(C)(10) motion fails to present such evidentiary proofs, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n2; 597 NW2d 28 (1999). Having waived the opportunity to present evidence to support its claim, Petitioners should neither be allowed to avoid MCR 2.116(C)(10) nor be heard to complain.

As the Petitioners failed to present any evidence in support of its claims, the Michigan Court of Appeals correctly concluded

that the fee in MCL 478.2(7) is not a registration fee and, hence, is not subject to preemption by 49 USC 11506.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
525 W. Ottawa Street
Lansing, Michigan 48909
Telephone: (517) 373-1124

Henry J. Boynton
Assistant Solicitor General

David A. Voges
Emmanuel B. Odunlami
Assistant Attorney General
Attorneys for Petitioners

Dated: May, 2004

APPENDIX

TABLE OF CONTENTS

	Page
Affidavit of Thomas R. Lonergan in *Westlake, et al v MPSC, et al*, Court of Claims Docket Nos. 95-15628 CM and 95-15631 CM.	1b
Affidavit of Timothy J. Yungfer in *Westlake, et al v MPSC, et al*, Court of Claims Docket Nos. 95-15628 CM and 95-15631 CM.	31b
Supplemental Affidavit of Timothy J. Yungfer in *Westlake, et al v MPSC, et al*, Court of Claims Docket Nos. 95-15628 CM and 95-15631 CM.	37b

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v

File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

TROY CAB, INC., et al,

Plaintiffs,

v

File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

Attorneys for Plaintiffs in Westlake
Karl L. Gotting (P14220)
Catherine A. Jacobs (P32996)
Loomis, Ewert, Ederer, Parsley, Davis & Gotting, PC
232 South Capitol Ave, Suite 1000
Lansing, MI 48933-1525
Telephone: (517) 482-2400

Attorneys for Intervening Plaintiffs in Westlake
Iris K. Socolofsky-Linder (P31673)
Michael S. Ashton (P40474)
Fraser, Trebilcock, Davis & Foster, P.C.
1000 Michigan National Tower
Lansing, Michigan 48933
Telephone: (517) 482-5800

Andrew K. Light
James H. Hanson
Lynne D. Lidke
Scopelitis, Garvin, Light & Hanson, P.C.
1777 Market Tower
Ten West Market Street
Indianapolis, IN 46204
Telephone: (317) 637-1777

Daniel R. Barney
Robert Digges, Jr.
Cynthia Tripi
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4677
Telephone: (703) 638-1865

Attorneys for Plaintiffs in Troy Cab
John L. Collins (P12065)
Robert E. McFarland (P17394)
Gary J. McRay (P17554)
Kathryn M. Niemer (P34234)
FOSTER, SWIFT, COLLINS & SMITH
32300 Northwestern Highway
Suite 230
Farmington Hills, MI 48334
Telephone: (810) 851-7500

Attorneys for Defendants
Don L. Keskey (P23003)
Henry J. Boynton (P25242)
David M. Gadaleto (P30163)
Tonatzin M. Alfaro Garcia (P36542)
Department of Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 334-7650

AFFIDAVIT OF THOMAS R. LONERGAN

Thomas R. Lonergan, being first duly sworn, deposes and says as follows:

1. Affiant is the Director of the Motor Carrier Regulation Division of the Public Service Commission, Michigan Department of Commerce, and has held this position for approximately nine years.

MOTOR CARRIER ACT

2. The Motor Carrier Regulation Division (MCRD) is responsible for assisting the Commission in the administration of the Michigan Motor Carrier Act, 1933 PA 254, as amended, MCL 475.1, et seq, the title to which begins as follows:

> "AN ACT to promote safety upon and conserve the use of public highways of the state; …..". (Emphasis added).

3. The titled purpose of promoting safety upon and conserving the use of public highways is restated in the purpose and policy section of the Act, MCL 475.2, which in pertinent part states as follows:

> "It is hereby declared to be the purpose and policy of the Legislature in enacting this law to confer upon the Commission the power and authority and to make it its duty to supervise and regulate the transportation of property by motor vehicle for hire upon and over the public highways of this state in all matters whether specifically mentioned herein or not, so as to:
> ... (b) protect and conserve the highways and protect the safety and welfare of the travelling and shipping public in their use of the highways;
> ...." (emphasis added)

4. The motor carrier transportation industry provides a public service, but also increases the risk of harm to the traveling public and damage to the public highways. The transportation by motor vehicle for hire is a commercial enterprise for profit which utilizes the public highways in conjunction with the travelling public. Since motor vehicles for-hire increase the risk of harm to those using the highways as well as the cost of maintaining those highways, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the

public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes.

5. The title to the Motor Carrier Act provides for the collection of fees and taxes from motor carriers to promote the highway safety and conservation purposes of the Motor Carrier Act as follows:

> "... To provide for the levy and collection of certain privilege fees and taxes for such carriers for such purposes and the disposition of such fees and taxes; ...". (Emphasis added).

6. The Motor Carrier Act, also provides for the regulation of price, route and service of motor carriers for-hire. The title of the act in pertinent part states as follows:

> "... to give the Commission jurisdiction and authority to fix, alter, regulate and determine rates, fares, charges, classifications, and practices of common motor carriers for such purposes; to require filing with the Commission of rates, fares and charges of contract carriers and to authorize the Commission to prescribe minimum rates, fares, and charges, and to require the observance thereof; to prevent unjust discrimination; ..."

7. The regulation relating to price, route and service are also provided for in the purpose and policy section of the act, MCL 475.2 which in pertinent part states as follows:

> "(d) Meet the needs of motor carriers, shippers, or receivers, and consumers; (e) allow a variety of quality, price, and service options to meet changing market demands and the diverse requirements of the shipping public; (f) allow

> the most productive use of equipment and energy resources; (g) provide the opportunity for efficient and well-managed motor carriers to earn adequate profits and attract capital; ... (i) prevent unjust discrimination; ... (k) provide and maintain service to small communities and small shippers; ... (m) promote entrepreneurship in the motor carrier industry by allowing greater contract carrier economic and entry flexibility; ..."

The Motor Carrier Act was also designed to stabilize the industry by limiting entry and regulating rates, routes and services so as to assure quality transportation services to the public, and promote safety upon and conservation of the public highways. Since January 1, 1995 the Motor Carrier Division of the Michigan Public Service Commission has not enforced any of the laws or regulations relating to the price, route or service of a motor carrier.

8. A partial legislative history of Michigan motor carrier regulation includes the following significant events:

a. 1933 Passage of P.A. 254, Michigan Motor Carrier Act

b. 1963 Passage of P.A. 181 Motor Carrier Safety Act, jurisdiction assigned to the Public Service Commission. No funding provided.

c. 1966 PA 162 amends Motor Carrier Act to repeal levy of weight-distance tax on motor carriers, substitutes per vehicle annual fee of $50.00 and application fee of $20.00

d. 1982 PA 354 amends the Motor Carrier Act. Partial deregulation, collective ratemaking authorized, fee increases to improve regulation and

enforcement:

application fee	$20 to $100
annual decal fee	$50 to $100

e. 1982 Executive Order 1982-1 transfers jurisdiction of Motor Carrier Safety Act and the PSC enforcement division to the State Police. Funding continues to be provided from PSC generated motor carrier fees.

f. 1988 PA 347 requires interstate motor carriers to register ICC authority and pay $10 per vehicle fee. To be effective 1/1/90.

g. 1991 Public Law 102-240 "Intermodal Surface Transportation Efficiency Act of 1991" mandates state participation in the "Single State Registration System" to be effective 1/1/94.

h. 1993 PA 352 amends to Motor Carrier Act to further deregulate; requires PSC to develop a safety rating system.

i. 1994 Public Law 103-305 "Federal Aviation Administration Authorization Act of 1994." Sec 601 preempts certain state and local authority for economic regulation of motor carriers.

INTERSTATE VERSUS INTRASTATE COMMERCE

9. Regulation of the motor carrier industry in this nation has traditionally involved a dual system of federal and state regulation. The Interstate Commerce Commission regulates interstate motor carrier transportation while state regulation of intrastate commerce has been preserved. Pursuant to 49 USC § 10521 (**Exhibit A**) the general jurisdiction of the Interstate

Commerce Commission over transportation by motor carriers is defined, and thus leaves the states to regulate intrastate operations involving a pickup and delivery of property in the same state without a prior or subsequent movement through another state.

10. Historically, the Interstate Commerce Commission has regulated motor carriers operating in interstate commerce in a similar fashion to the way the Michigan Public Service Commission has regulated motor carriers operating in intrastate commerce. Certificates of authority to conduct operations, together with tariffs covering rates, routes and services have been provided by the ICC for interstate operations and the MPSC for intrastate operations. The Michigan Motor Carrier Act requires interstate carriers to comply with the Michigan Motor Carrier Act, except to the extent the Act is inconsistent with or contravenes federal law. See MCL 476.12, MCL 477.10 and MCL 478.7. The MPSC regulates the for-hire transportation of property by motor carriers which move wholly within the state (intrastate). If the property to be transported is to be moved by the owner of the property in motor vehicles owned or leased by the owner of the property, then the movement is private carriage, not regulated by the MPSC or the ICC. Otherwise, the for-hire transportation of property intrastate requires a motor carrier to obtain MPSC operating authority.

11. According to the 1993-1994 NARUC compilation of transportation regulatory policy (**Exhibit B**) 45 states and U.S. Territories have some form of regulation of common carriers. The vast majority of these states and territories also regulate insurance (45 states), safety (33 states) as well as the registration of interstate carriers (37 states). Thirty-nine states (39) also assess a fee for intrastate registration of motor carrier operations. Thirty-two (32) states or territories (32) utilize an identification device for vehicles such as a decal or stamp. A few states also regulate private carriers.

MOTOR CARRIER FEE SYSTEM

12. Article 4 of the Michigan Motor Carrier Act, MCL 478.1 through MCL 478.8 provides for the collection of certain fees referred to in the title of the Act to carry out the Act's purposes. Of all the motor carrier fees collected, approximately half go to the Department of State Police for safety enforcement of the motor carrier industry. The remainder is used by the MPSC and the Michigan Department of Commerce for the administration of the Motor Carrier Act which includes enforcement of safety, financial fitness and insurance requirements for motor carriers.

13. The intrastate authority application fee at MCL 478.1 is paid by an applicant for an intrastate MPSC certificate. An interstate motor carrier would not pay this fee. The fee is $100 for the original application and $50.00 for the annual renewal. This fee amount has remained the same since 1982. Prior to the 1982 amendments to the act, the application fee was $20.00 and the renewal fee $10.00. The application process involves several steps including checking the completeness of the application, performing a safety review of the applicant, publishing a notice of the application in the bulletin, and preparing a file for Commission consideration. In the event of a protest, a hearing is also scheduled. Prior to January 1, 1995, oral testimony or written affidavits were also required regarding the public need for the services. The renewal requires a vehicle update and proof of insurance along with payment of fees. The intrastate application fees and renewal fees generate approximately $200,000 per year in revenue which is merged with other motor carrier fee revenues and appropriated to the Public Service Commission, Department of Commerce and Michigan State Police. Any unexpended balances are deposited in the Michigan Transportation Fund at the end of the fiscal year. In fiscal year 1993-94, the PSC collected $224,000 in PSC application fees.

14. A motor carrier obtaining intrastate authority must also determine the vehicles which it will assign to intrastate transportation. A list of the equipment providing intrastate services is furnished with the original application or renewal application. An example of such a listing is attached as **Exhibit E**. A carrier also pays the $100 annual fee relating to his intrastate authority for each vehicle pursuant to MCL 478.2(1). The carrier itself selects which self-propelled power units and how many units, relate to provision of intrastate authority and makes the requisite payment relating to said vehicles. The MPSC Staff does not determine how many units, or which units, are used for intrastate authority. This is a matter solely determined by each carrier a good faith basis, without review by the MPSC Staff. Each carrier makes a determination concerning what portion of their vehicle fleet should be apportioned or allocable to Michigan intrastate authority based upon his own operations, business determinations, and factors which are relevant to his own business circumstances or situation. Neither the MPSC Staff nor the MPSC have undertaken any complaint or other enforcement action relating to second guessing or challenging the vehicle fees paid by a carrier utilizing each carrier's own judgment as to the portion of its fleet to be used for intrastate operations in Michigan based upon its own business circumstances.

15. The intrastate annual vehicle decal fee found at MCL 478.2(1) is paid after an intrastate motor carrier has obtained an MPSC motor carrier certificate. Before the carrier commences operations under its certificate, it must purchase a decal for each power unit at a fee of $100 each. This decal identifies that the carrier has paid its fee and is affixed to the door of the vehicle. A six-month decal is also available after July 1 for $50.00. Each calendar year the decals must be replaced. A household goods carrier only pays a $50.00 annual fee. These fees have remained the same since 1982. Prior to that time the fee was $50.00 except for household goods carriers which paid $20.00. Prior to 1966, the Commission collected a

weight/distance tax rather than a per vehicle fee. This fee, MCL 478.2(1), is the largest source of revenue for the Public Service Commission motor carrier regulation functions and also supports the State Police Motor Carrier Division, which until 1982 was part of the PSC. These fees support State Police enforcement of the Motor Carrier Act, Motor Carrier Safety Act, size and weight limitations, enforcement of the Vehicle Code and other laws governing commercial motor vehicles and motor carriers. In calendar year 1994, the PSC collected approximately $2,905,000 in intrastate vehicle decal fees.

16. The interstate annual vehicle decal fee found at MCL 478.2(2) is paid by an interstate motor carrier only on vehicles registered and plated through the Michigan Secretary of State. The Commission has always interpreted vehicles "registered in this state" as meaning registered and license plated with the Secretary of State. An interstate carrier which registers its vehicles in any other state or province does not pay this fee. The fee is $100.00 per calendar year per vehicle or $50.00 after July 1. A decal identical to the intrastate decal is issued and affixed to the door of the vehicle. This fee has remained the same since 1982. It was $50.00 from 1966 to 1982. These fees amounted to approximately $751,000 in 1994. The revenue from these fees is combined with other motor carrier fee revenue and appropriated by the Legislature for expenditure by the PSC and the State Police Motor Carrier Division. These fees support enforcement of the Motor Carrier Act, Motor Carrier Safety Act, Michigan Vehicle Code, size and weight regulation, and other laws governing commercial vehicles and motor carriers. Since 1966, the fees paid by intrastate PSC regulated motor carriers and interstate motor carriers commercially registered in Michigan have been identical. The fees levied on interstate motor carrier vehicles commercially registered in other states are covered by MCL 478.7 and are a maximum of $10.00. For fiscal year 1993-1994 the Commission collected $2,235,000 pursuant to MCL 478.7(4).

17. The federal single state system of registration, providing for a $10 fee for registering federal authority in each state, is established under the federal sphere of regulation of interstate transportation under the Interstate Commerce Act of 1980 as amended, as the exercise of the federal portion of jurisdiction under the dual nature of state/federal regulation of motor carrier transportation. The separate intrastate fees collected by Michigan and most other states relate to intrastate transportation and the exercise of the states powers relative to the state portion of the dual federal-state jurisdictional system. The intrastate fees collected by the state should not be confused with the single state registration system adopted for the separate federal system.

18. The annual renewal fee collections (478.1) as well as the various annual vehicle fees collections (478.2(1), 478.2(2) and 478.7) for the plaintiffs as well as a sample of large motor carriers that operate in Michigan for the years 1993, 1994 and 1995 are attached as **Exhibit C**. This data demonstrates the diversity of types and amounts of fees paid by the plaintiffs and others. The motor carriers make various business decisions that impact the amount of fees. These decisions involve the location of the principal place of business, the state in which the carrier chooses to register its vehicles and whether or not the carrier has obtained an intrastate certificate.

19. The Legislature expected that motor carriers with a close nexus to Michigan (vehicles operating in intrastate commerce with MPSC authority or vehicles plated in Michigan) would pay fees for the administration of the Motor Carrier Act, the purposes of which are to promote safety, conserve highways and economically regulate the industry. Michigan motor carrier fees under MCL 478.1 and MCL 478.2 are not paid by motor carriers engaged in interstate commerce on vehicles plated in another state. The rationale for charging interstate vehicles plated in Michigan a fee, under MCL 478.2(2), and not charging interstate vehicles plated in another state is a fee that vehicles which are license plated in Michigan

are based in Michigan, and therefore have a greater utilization of the highways and services in Michigan than do vehicles plated in another state. Different states collect various fees and taxes from motor carriers in different combinations and in significantly different amounts. See **Exhibit B** for a chart which shows fuel taxes, truck and trailer registration and other fees (including motor carrier fees such as Michigan's decal fees). Many of these fees apply to both intrastate and interstate motor carriers and motor vehicles.

SINGLE STATE REGISTRATION

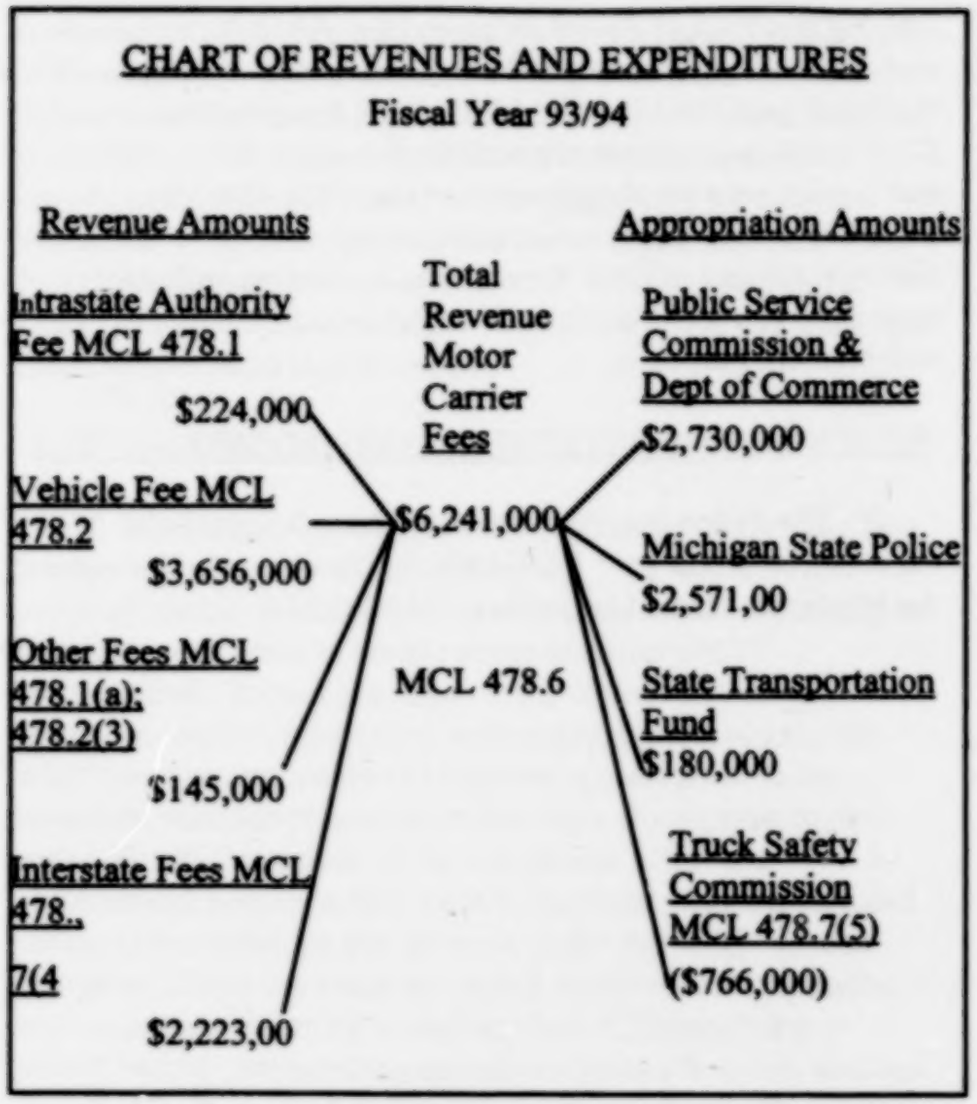
20. The Single State Registration system, to which the $10 fee applies, relates to filing of interstate ICC authority and proof of insurance with each state for each vehicle operating in interstate commerce to enable states to enforce ICC requirements. It does not relate to the state registration requirements for registration, authorities, license plates, etc. which may be applicable to intrastate operations or those interstate vehicles or operations having a close nexus to the state. The ICC has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on the states for this purpose under the SSRS system. Congress allows the states to require motor carriers operating with interstate authority to register their ICC certificate or permit before commencing operations within that state and has specifically found that such registration is not an unreasonable burden on transportation when registration is completed under the standards of the single-state-registration system found at 49 USC § 11506. Under the single state registration system, an interstate motor carrier is required to register annually with only one state by filing its ICC certificate or permit and proof of insurance along with the payment of a fee for each participating state not to exceed $10.00 per vehicle which the motor carrier admits will operate in each participating state.

21. Michigan is a participating state in the single state registration system and pursuant to the Michigan Motor Carrier

Act, MCL 478.7(4), levies an annual fee of $10.00 or less on each interstate motor carrier vehicle operated in Michigan. In the fiscal year 1993 to 1994 Michigan collected approximately $2,223,000 in interstate registration fees under MCL 478.7(4) and consistent with the requirements of MCL 478.7(5), $766,000 of those fees collected were deposited with the Truck Safety Fund and utilized for safety education programs for motor carriers and Michigan State Police safety and enforcement purposes.

REVENUE COLLECTED FROM MOTOR CARRIER FEES

22. The following chart shows revenue collected and expenses for fiscal year 1993-1994 for motor carrier fee under the Michigan Motor Carrier Act, 1933 PA 254:



As is evident from the above chart, the total amount of regulatory fees collected under the Motor Carrier Act are closely matched to the State of Michigan's cost of regulating motor carriers to carry out the purpose of the Act.

APPROPRIATIONS FOR SAFETY

23. The safety purposes of the Michigan Motor Carrier Act, 1933 PA 254, are carried out in part by the PSC which administers the following safety functions:

a. A MPSC certificate is issued to a motor carrier only after a safety review consistent with requirements set by the Commission in Order T-1281.

b. A certificate may be revoked or suspended for unsafe operations.

c. Regulatory compliance with state and federal vehicle and driver regulations through the certificate process.

d. Regulatory compliance with insurance coverage requirements.

24. Prior to 1982, the Michigan Public Service Commission utilized its own enforcement division to carry out safety inspections, traffic enforcement, safety audits and the operation of scale sites for motor carriers. In 1982, Governor Milliken transferred by Executive Order 1982-1, the PSC Enforcement Division to the Department of State Police along with the responsibility and funding for enforcement of the Motor Carrier Safety Act, 1963 PA 181. Under the Motor Carrier Safety Act, the Motor Carrier Division of the State Police is responsible for the following safety functions:

a. Vehicle requirements such as brakes, load securement, inspections, etc. are specified and enforced.

b. Driver requirements such as hours of service, licensing, medical certificates, etc. are specified and enforced.

c. Drug and alcohol testing requirements are enforced.

d. Safety inspections and audits are conducted.

e. Regulates movement of hazardous materials.

25. Approximately half of all Michigan motor carriers fees collected are appropriated by the Legislature to the Motor Carrier Division of the Department of State Police for safety enforcement and inspections of motor carrier vehicles. Title XII of Public Law 99-570, 49 CFR Federal Motor Carrier Safety Regulations are administered by the Federal Highway Administration of the U.S. Department of Transportation. Through agreements with the State of Michigan, the Motor Carrier Division of the State Police also enforces the federal requirements which in pertinent part include the following:

a. Requires uniform commercial drivers license.

b. Specifies vehicle and driver requirements.

c. Establishes drug and alcohol testing requirements.

d. Specifies accident reporting requirements.

e. Regulates transportation of hazardous materials.

f. Establishes a motor carrier safety rating system.

PREEMPTION OF PRICES, ROUTES AND SERVICE

26. On August 23, 1994, President Clinton signed into law the Federal Aviation Administration Authorization Act of 1994 (FAAA Act), amending Title 49 USC § 11501, which took effect on January 1, 1995.

27. On September 8, 1994, the Michigan Public Service Commission, in direct response to the enactment of 49 USC § 11501(h) issued an "Order and Notice of Hearing Commencing Contested Case Proceedings for An Order Regarding Federal Preemption of State Motor Carrier Regulation", to examine the effect of 49 USC § 11501(h) on the Michigan Motor Carrier Act and Rules. The proceeding was conducted as a contested case pursuant to the Administrative Procedures Act of 1969 and the Commission's Rules of Practice and Procedure.

28. In its January 11, 1995 Opinion and Order the Commission recognized that only the Legislature had the authority to revise the Michigan Motor Carrier Act:

> . . . This order is therefore intended solely to provide guidance regarding how the Commission expects intrastate motor carrier regulation to operate in Michigan after January 1, 1995. Thus, interested parties retain the right to request a different interpretation from the Commission, the Courts, and the Legislature regarding the effect of Section 601 on the issues addressed below.

29. The Commission found in its January 11, 1995 Opinion and Order that section 601(h) of the FAAA Act, 49 USC § 11501(h) specifically provides for the preemption of state economic regulation of motor carriers engaged in the intrastate transportation of property to the extent such regulation is related to a price, route, or service.

30. The Commission found in its January 11, 1995 Opinion and Order that Congress limited the preemptive reach of Section 601 under the heading "Matters not Covered" found at 49 USC § 11501(h)(2). There Congress specifically stated as follows:

(1) – (a) Shall not restrict the safety regulatory authority of a state with respect to motor vehicles, the authority of the state to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a state to regulate motor carriers with regard to minimal amounts of financial responsibility relating to insurance requirements and self insurance authorization; and (b) does not apply to the transportation of household goods.

31. Pursuant to the Commission's January 11, 1995 Order in MPSC Case T-1273, applications for intrastate authority have been issued for 1995 on a state-wide basis, namely, a motor carrier wishing to perform intrastate service in Michigan makes application for authority for the entire state of Michigan, and pays the requisite application fee. The application then is subject to review for safety, fitness, insurance requirements, and other matters to ensure that the carrier may be authorized to perform services in Michigan. Due to the adoption of Section 601 of the FAAA, effective January 1, 1995, authority is no longer issued relative to any specific rate, route, or service, except for household goods carriers. A copy of the statewide application for intrastate authority is attached as **Exhibit D**. The safety review consists of an analysis of Part II of the Application, Safety Information, as well as any supplemental data that may be requested; U.S.D.O.T. records regarding safety ratings; and Michigan State Police files regarding vehicle inspections, violations found and citations issued. From those materials a safety profile is developed in accordance with the Commission's order in Docket T-1281.

32. Congress also placed beyond the preemptive reach of Section 601, in an optional format, the continuation of certain standard state transportation practices with regard to uniform cargo liability rules, uniform bills of lading, uniform cargo

credit rules and anti-trust immunity for joint line rates or routes, classifications and mileage guides if compliance with state law was no more burdensome than compliance with federal law covering the same subject and if requested by a carrier.

33. In its January 11, 1995 Opinion and Order, the Commission noted that the most important issue to be decided was whether Section 601 preempts the MMCA and rules, either in their entirety or, with respect to only those regulatory provisions concerning price, route and service, and concluded as follows:

> Despite some parties' assertions to the contrary, the wording of [s]ection 601 stops far short of precluding state regulation of all aspects of motor carriage. For example, its heading reads "Preemption of State Economic Regulation of Motor Carriers." This implies that, of the range of areas presently covered by state regulation, economic regulation (rather than regulation of safety, fitness, insurance, etc.) was singled out by Congress for at least partial preemption. Such an implication is further supported by the "General Rule" set forth in [s]ection 601(h)(1), which states only that states "may not enact or enforce a law, regulation, or other provision . . . <u>related to a price, route, or service</u>" of any for-hire or private motor carrier. (Emphasis added.) Issues involving prices, routes, and services have long been considered by the motor carrier industry to fall within the definition of economic regulation.
>
> Furthermore, [s]ection 601 lists several exceptions to Congress' preemption of economic regulation. Foremost among these is the statement that [s]ection 601:
>
> > "[S]hall not restrict the safety regulatory authority of a State with respect to motor

> vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization." [Section 601(h)(2)(A).]

Next, [s]ection 601 states that its preemptive effect "does not apply to the transportation of household goods." [Section 601(h)(2)(B).] Finally, under the heading "State Standard Transportation Practices," [s]ection 601 indicates that it "shall not affect any authority of a State . . . to enact or enforce" a law, rule, or regulation related to uniform cargo liability rules, uniform bills of lading or receipts for property being transported, uniform cargo credit rules, or antitrust immunity for joint-line rates or routes, classifications, and mileage guides. [Section 601(h)(3)(A).] However, it further provides that continuing regulatory authority over these standard transportation practices (1) will only arise where the law, rule, or regulation "is no more burdensome" than compliance with federal laws covering the same issue and corresponding regulations issued by either the ICC or the U.S. Secretary of Transportation, and (2) will only apply to a carrier "upon request of such carrier." [Section 601(h)(3)(B).] Therefore, the language of [s]ection 601 reflects that its preemptive effect was not intended to be all-encompassing.

The legislative history of [s]ection 601 supports a similar conclusion. According to the

Conference Report, its passage was not designed to preempt all state regulation of motor carriage. Rather, it was intended only to "level the playing field between air carriers on the one hand and motor carriers on the other with respect to economic trucking regulation." (Conference Report, p. 82.) [Emphasis added.] Specifically, Congress sought to eliminate the substantial competitive advantage given to air carriers like Federal Express Corporation over traditional motor carriers like UPS as a result of Federal Express Corp v California Public Utilities Comm, 936 F2d 1075 (CA 9, 1991), cert den ___ US ___ (1992). The drafters' intent to achieve this result while limiting the breadth of [s]ection 601's preemptive effect can be discerned from page 85 of the Conference Report, where it is noted that:

> "New subsection (h)(2) emphasizes that State authority to regulate safety, financial fitness and insurance, transportation of household goods, vehicle size and weight and hazardous materials routing of motor carriers is unchanged since State regulation in those areas is not a price, route or service and thus is unaffected." [Emphasis added.]

The Conference Report goes on to disclose that, in return for an agreement by the American Trucking Association (ATA) to withdraw its opposition to the FAA[A] Act, Congress endeavored to structure [s]ection 601 in a way that would "allow regulatory protection to continue for noneconomic factors, such as liability rules, antitrust immunity to publish

documents, insurance, safety, leasing and cargo credit rules." (Conference Report, p. 88.)

Based on [s]ection 601's wording and legislative history, the Commission concludes that it preempts only those provisions of the [MMCA] and the Rules relating to price, route, and service. In reaching this conclusion, the Commission specifically rejects [Appellant] Central's argument that, because the primary focus of the [MMCA] has always been on economic regulation, no basis exists for continuing state regulation of motor carriage. The Commission reaches this conclusion for two reasons. First, [s]ection 601 does not require that, to avoid preemption, safety regulation must be the primary focus of any state statute regulating motor carriage. Second,. . .safety concerns occupy at least co-equal status with the economic regulation found in the [MMCA]. For example: (1) the first clause of this title states that it is "[a]n act to promote safety upon and conserve the use public highways of the state;" (2) MCL 475.2 proclaims, in pertinent part, that "[i]t is hereby declared to be the purpose and policy of the legislature in enacting this law to confer upon the [C]ommission the power to . . . protect the safety and welfare of the traveling and shipping public in their use of the highways;" and (3) MCL 476.5 requires that, to receive a certificate of authority, a prospective motor carrier must show that it is fit--which is defined as being safe, suitable, and financially responsible--and that its vehicles "may be operated safely upon the public highways."

Similarly, the Commission does not find persuasive [Appellant] Central's claim that, by

using the phrase "motor vehicles" instead of "motor carriers" in portions of [s]ection 601(h)(2)(A), Congress intended to strip state regulatory commissions of their power to address safety issues and to limit the oversight of these issues to law enforcement agencies. At the federal level, the definition found at 49 USC 10102(13) shows that the phrase "motor carriers" refers only to common and contract motor carriers. In contrast, by reading 49 USC 10102(17) in conjunction with 49 USC 10102(16) and 49 USC 10102(26), it appears that the phrase "motor vehicles" extends to private motor carriers as well. Congress' use of the broader terms thus likely arose from a recognition that several state commissions regulate private carriers, in addition to common and contract carriers, at least with regard to safety. This fact, when coupled with [s]ection 601's legislative history, supports rejection of [Appellant] Central's claim.

For all of these reasons, the Commission finds that [s]ection 601 preempts only those portions of the [MMCA] and the Rules relating to price, route, and service. [Pages 20-24]

34. In its January 11, 1995 Opinion and Order, the Commission found consistent with the Conference Report to Section 601 that the Commission would continue to issue certificates of authority to motor carriers operating in intrastate commerce based upon the carrier's ability to demonstrate compliance with state law regulating safety, financial fitness and insurance.

35. In its January 11, 1995 Opinion and Order the Commission found that neither the language of Section 601 nor the conference report imply that fees imposed by a state's

existing regulatory structure might fall within issues related to price, routes or services, and that continued collection of the fees under MCL 478.2 was not preempted. The Commission attached to its January 11, 1995 Opinion and Order, a copy of the Michigan Motor Carrier Act and Rules showing which sections of the act and rules were preempted by drawing a line through the preempted sections.

EFFECT OF PREEMPTION ON MOTOR CARRIER DIVISION

36. The Motor Carrier Division Staff has used the January 11, 1995 Opinion and Order to guide its activities since January 11, 1995. Even prior to the Commission orders in Case No. T-1273, the Staff had taken steps to implement the federal act. New certificate application forms were developed and placed into use as of 11/15/94 which deleted all consideration of routes and services. All rates and tariffs were determined to be invalid as of 1/1/95 and all rate and tariff filings after that date were returned. Applications for certificates of authority continue to be reviewed to determine if the applicant has a satisfactory safety rating or other evidence that the carrier could or would operate safely. Insurance certification continues to be required and continuous coverage monitored. Household goods carriers continue to be regulated as to authority, rates and consumer protection. The 1995 certificate and decal renewal process was performed as required by the statute and the Commission orders in Case No. T-1273. Further, the 1995 Single State Registration Renewal process for interstate motor carriers was continued.

37. The Motor Carrier Division works to promote safety upon the highways and to assure motor carrier fitness and compliance with existing state laws, regulations and orders of the Commission. The Safety and Compliance Section of the Motor Carrier Division works with the Motor Carrier Division of the Department of State Police to assure safe operations by motor carriers and ensure compliance with applicable laws.

The Safety and Compliance Section is required to conduct review of applications for authority as mandated by the Commission's January 11, 1995 order implementing safety rating system, T-1281, which was issued in response to 1993 legislative amendments to the Motor Carrier Act, 1993 PA 352, MCL 479.41-43; MSA 22.587(1)(-)(3), which required the Commission to develop and implement a motor carrier safety rating system by January 1, 1995. Since passage of the FAAA Act and the resulting elimination of complaints about rates or services (except for household goods carriers) the Motor Carrier Division has focused more of its resources on the safety issues required by 1993 PA 254. In 1994, the MPSC Motor Carrier Division had 21 positions. After passage of the FAAA Act in August, new application forms were developed, new procedures put into effect and participation by Staff in the Commission's preemption proceeding was required. The Staff ceased accepting filings related to "rates, routes or services" on or about November 15, 1994 and began to accept applications for authority renewal based only on safety and fitness for operating year 1995.

38. Following preemption, the volume of applications for an original certificate of authority increased dramatically because of the changed entry requirements. The new safety rating system required by 1993 PA 352 and made effective January 1, 1995 required Staff to conduct a safety review of all of the new applicants as well as assuring proper insurance. It was evident that many of these applicants were unfamiliar with legal safety requirements such as drug testing and annual vehicle inspections, some did not even have a commercial drivers license. Thus, a significant education component was required in 1995 and the MPSC Staff worked with the Michigan Trucking Association to provide educational resources.

39. For the fiscal year ending 9/30/95, the Legislature has appropriated 2,162,200 to the Public Service Commission from motor carrier fees collected pursuant to the Motor Carrier Act.

Of that amount, 1,584,800 was for the Motor Carrier Regulation Division and the remaining 577,400 for overhead and support operations of the Commission such as financial and personnel services and hearing officers. An additional 566,300 was appropriated to the Department of Commerce for support services such as office rent and data processing services. This appropriations act was signed in July of 1994 and did not anticipate the passage of the federal preemption act.

40. The fiscal year 1995-96 budget for the MPSC and the Department of Commerce reflects significantly less resources funded by motor carrier fees. In fiscal year 1994-95, the total motor carrier fees apportioned to the Public Service Commission and the Department of Commerce was $2,728,500. For fiscal year 1995-96, the aforementioned appropriated amount has been reduced to $1,936,000, a reduction of $791,500.

41. The unavailability of the motor carrier fees to support these appropriations would result in the elimination of approximately 22 positions supporting current in the continuing motor carrier regulation functions. A description of the specific functions of the MPSC Motor Carrier Regulation Division and how they are changed by the Federal Act are as follows:

a. Safety and Compliance: this work unit consists of three staff who perform safety evaluations on applicants for a MPSC certificate. They also handle complaints against motor carriers for safety or insurance problems. Prior to 1/1/95, they also handled complaints related to economic regulation. After the issuance of the Commission order on 1/11/95, T-1281 regarding the motor carrier safety rating system, the

complexity of the safety evaluations significantly increased. The size of this unit has not changed as a result of preemption.

b. Rates and Tariffs: this work unit currently consists of one staff person who handles economic regulation of the household goods industry and water carriers and the few remaining elements of motor carrier rate regulation as provided by the FAAA Act, 49 USC 11501. Prior to 1/1/95, this unit also included an auditor. This position was eliminated due to preemption.

c. Authorities: this work component of the Operations Section consists of three staff persons who process applications for MPSC certificates. This administrative function involves working with applicants on requirements, notices, legal sufficiency of documents and preparation of orders and certificates. Prior to 1/1/95, this work component had four staff, one staff position has been eliminated due to preemption by the FAAA Act.

d. Revenue Collection and Issuance of Credentials: The remaining staff positions of the Operations Section handle the various fee collections, issuance of decals and SSRS receipts and maintain a walk-in over-the-counter service for motor carriers. This function currently utilizes nine staff positions, but prior to preemption utilized 10 staff positions.

e. Management: The Motor Carrier Regulation Division also has a director and secretary.

REBUTTAL TO TNT HOLLAND'S AFFIDAVIT

44. Affiant has reviewed the intervenor's motion for summary disposition in this case as well as the affidavit of Mr. James C Crozier of TNT Holland Motor Express, Inc.

45. Affiant has a general knowledge of TNT Holland's operations in the State of Michigan based on several years of regulatory oversight. TNT Holland is a major intrastate motor carrier which generated over $11.8 million in strictly intrastate revenue in 1993. TNT Holland is the 5th largest general commodity motor carrier in terms of intrastate revenue and increased its intrastate revenue 27% in 1993 over 1992. TNT Holland operates a network of 7 terminals in the State of Michigan from which it makes daily pickups and deliveries to hundreds if not thousands of customers. It also has contracts with numerous large shippers which involve significant intrastate business. By its own admission it uses in excess of 1,300 trucks or tractors in intrastate commerce.

46. Mr. Crozier takes the position that TNT Holland's intrastate operations are incidental to its interstate operations and therefore the intrastate vehicle fee imposed by 478.2(1) is a burden on interstate commerce rather than intrastate commerce. The scope of operation described above demonstrates the contrary.

47. TNT Holland is a well managed, efficient and profitable motor carrier. Management decides which vehicles are to be used for intrastate operations based on the judgement that they will generate intrastate revenue. Those vehicles not used in Michigan intrastate commerce are not subject to the $100 vehicle fee.

48. Mr. Crozier states that TNT Holland engages in intrastate commerce in 17 states. Many of those states continue to regulate the intrastate operation of motor carriers and collect a certificate application fee, a renewal fee and an annual vehicle fee just like Michigan does. (See **Exhibit B**).

49. Throughout the arguments of plaintiffs is the underlying premise that the 478.2(1) fee is an "interstate" fee and therefore a burden on interstate commerce. It is an intrastate fee. Interstate motor carriers pay vehicle specific fees pursuant to MCL 478.2(2) or 478.7 of the Motor Carrier Act. TNT Holland pays the intrastate vehicle fee, 478.2(1) for intrastate operations which generate revenues, and utilize state highways and police protection. If plaintiffs' arguments were accepted, any motor carrier with ICC authority could avoid paying state fees or taxes for intrastate operations. 478.2(1) is fair because all vehicles used in intrastate commerce pay the same fee in exchange for police protection and use of state highways.

50. Intervenors argue that a fee which affects interstate commerce must be apportioned or otherwise factored on a mileage basis or exposure criteria. The argument is fallacious. The Single State Registration Program (federally authorized), is based on a flat fee of $10.00 or less per vehicle. The Michigan vehicle registration fee to obtain license plates is based on vehicle weight. The so-called "flat fees" are administratively simple and efficient. The American Trucking Association for years has fought against distance taxes as being too inefficient and difficult to administer.

51. If every state in the Union adopted MCL 478.2(1) there could be no multiplicity of fees because the fees relate only to Michigan intrastate authority..

Further, affiant sayeth not.

Thomas R. Lonergan

Subscribed and sworn to before me

this 14th day of September, 1995.

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

TROY CAB, INC., et al,

Plaintiffs,

v File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

Attorneys for Plaintiffs in Westlake
Karl L. Gotting (P14220)
Catherine A. Jacobs (P32996)
Loomis, Ewert, Ederer, Parsley, Davis & Gotting, PC
232 South Capitol Ave, Suite 1000
Lansing, MI 48933-1525
Telephone: (517) 482-2400

Attorneys for Intervening Plaintiffs in Westlake
Iris K. Socolofsky-Linder (P31673)
Michael S. Ashton (P40474)
Fraser, Trebilcock, Davis & Foster, P.C.
1000 Michigan National Tower
Lansing, Michigan 48933
Telephone: (517) 482-5800

Andrew K. Light
James H. Hanson
Lynne D. Lidke
Scopelitis, Garvin, Light & Hanson, P.C.
1777 Market Tower
Ten West Market Street
Indianapolis, IN 46204
Telephone: (317) 637-1777

Daniel R. Barney
Robert Digges, Jr.
Cynthia Tripi
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4677
Telephone: (703) 638-1865

Attorneys for Plaintiffs in Troy Cab
John L. Collins (P12065)
Robert E. McFarland (P17394)
Gary J. McRay (P17554)
Kathryn M. Niemer (P34234)
FOSTER, SWIFT, COLLINS & SMITH
32300 Northwestern Highway
Suite 230
Farmington Hills, MI 48334
Telephone: (810) 851-7500

Attorneys for Defendants
Don L. Keskey (P23003)
Henry J. Boynton (P25242)
David M. Gadaleto (P30163)
Tonatzin M. Alfaro Garcia (P36542)
Department of Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 334-7650

AFFIDAVIT OF TIMOTHY J. YUNGFER

Captain Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant is a Captain, Commanding Officer of the Motor Carrier Division of the Department of State Police, located at 300 N. Clippert, Lansing, Michigan 48913.

2. The Motor Carrier Division, Department of State Police, is responsible for promoting safety upon the highways through enforcement of state and federal laws relating to commercial vehicles and their use of the highways, including

the provisions of the Motor Carrier Act (Act No. 254 of the Public Acts of 1933), the Motor Carrier Safety Act (Act No. 181 of the Public Acts of 1963), the Michigan Vehicle Code (Act No. 300 of the Public Acts of 1949) and the Fire Prevention Act (Act No. 207 of the Public Acts of 1941).

3. The Motor Carrier Division of the Department of State Police employs approximately 165 inspection and enforcement officers and 13 clerical personnel to carry out the various functions and duties of the Motor Carrier Division throughout the State of Michigan.

4. Approximately 40 of the uniformed enforcement officers are assigned to road patrol duties at state police posts throughout the state, and 68 uniformed officers are assigned to individual scale sites.

5. The uniformed officers have full enforcement authority to enforce all of the general laws of the state as they pertain to commercial vehicles.

6. There exists in the Motor Carrier Division four specialized groups which carry out specific functions promoting safety upon the highways through enforcement of laws relating to commercial vehicles and their operations.

7. The first specialized group is the Investigative Section made up of three uniform officers and a supervisory sergeant. The investigative section is responsible for reviewing complaints processed through the Michigan Public Service Commission. The primary focus of the Investigative Section as of May 1995 has been to conduct safety compliance review of motor carriers at their terminals or corporate offices within the state. A safety compliance review may include an on-site inspection of the motor carrier's log books and files to determine if applicable motor carrier safety regulations are being followed. The investigative section is also responsible

for on-site safety inspections of the motor carrier's vehicles at the terminal.

8. The second specialized group is the Hazardous Materials Section comprised of 11 uniformed enforcement officers and a sergeant supervisor. This section is responsible the enforcement of safety regulations related to the transportation of hazardous materials.

9. The third specialized group is the Management Audit Section. This section is comprised of three uniformed officers and a supervisory sergeant. The Management Audit Section is primarily responsible for conducting safety audits known as compliance reviews on interstate and intrastate motor carriers utilizing the United States Department of Transportation safety rating system.

10. The fourth specialized section is the Bus Inspection Section, comprised of twelve inspectors and uniformed enforcement officers supervised by a sergeant. This section is responsible for ensuring that all school buses meet safety and equipment standards required by state law.

11. In addition to the four specialized groups, the enforcement officers assigned to road patrol throughout the state conduct safety inspections of commercial vehicles stopped on the highways. Road patrol officers are also responsible for the enforcement of the criminal laws and general regulations pertaining to the operation of commercial vehicles on the highway, including the enforcement of moving violations and size and weight laws.

12. Enforcement officers assigned to scale facilities throughout the state to promote safety upon the highways and protect highway infrastructure by enforcing size and weight laws, conducting driver and vehicle safety inspections of commercial vehicles, and inspecting for proof of registration,

operating authority, proof of insurance, and documentation that taxes and fees have been paid.

13. During the 1993/1994 fiscal year, the Motor Carrier Division received and appropriation of approximately $14 million, allocated in the following manner.

a. $2,553,700 from Motor Carrier Fees collected under the provision of the Motor Carrier Act.

b. $944,100 from the Michigan Truck Safety Commission.

c. $5,944,000 from the State Trunkline Fund.

d. $2,553,700 from the federal Motor Carrier Safety Assistance Program. States receiving funds under this program are required to contribute 20% of the funds received for the grant. Motor Carrier Fees are used, in part, as the state match.

e. $749,100 from the state general fund for school bus inspections.

f. $368,900 from hazardous materials inspection fees.

14. The Department of State Police has received funding from the assessment of fees collected under the provision of The Motor Carrier Act (Act No. 254 of the Public Acts of 1933), for the enforcement of the provisions of The Motor Carrier Act and the enforcement of other safety laws and regulations pertaining to the operation of commercial vehicles, since the transfer of the motor carrier enforcement function to the Department of State Police from the Michigan Public Service Commission by Executive Order in 1982.

15. Since the 1991/92 fiscal year, the Motor Carrier Division of the Department of State Police has received and expended Motor Carrier Fees in accordance with the chart identified as attachment "B".

16. The unavailability of the approximate $2.6 million from motor carrier fees and the subsequent reduction in state matching funds for the motor carrier safety assistance program would result in the elimination of 45 uniform enforcement officer positions (not including the reduction in officers to pay for unemployment benefits) assigned to road patrol and weigh station operations. This represents an approximate one-third reduction in resources utilized to promote safety upon and conserve the use of state highways.

17. Since January 1, 1995, the Motor Carrier Division of the Department of State Police has been in compliance with the Federal Aviation Administration Authorization Act which prohibits states from enforcing any laws or regulations related to the price, route or services of a motor carrier.

Further affiant sayeth not.

_____

Captain Timothy J. Yungfer

Subscribed and sworn to before me

this 14th day of September, 1995.

_____

Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WESTLAKE TRANSPORTATION, INC., et al,

Plaintiffs,

v File No. 95-15628 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

TROY CAB, INC., et al,

Plaintiffs,

v File No. 94-15631 CM
Hon. James R. Giddings

MICHIGAN PUBLIC SERVICE COMMISSION, et al

Defendants.
_____/

Attorneys for Plaintiffs in Westlake
Karl L. Gotting (P14220)
Catherine A. Jacobs (P32996)
Loomis, Ewert, Ederer, Parsley, Davis & Gotting, PC
232 South Capitol Ave, Suite 1000
Lansing, MI 48933-1525
Telephone: (517) 482-2400

Attorneys for Intervening Plaintiffs in Westlake
Iris K. Socolofsky-Linder (P31673)
Michael S. Ashton (P40474)
Fraser, Trebilcock, Davis & Foster, P.C.
1000 Michigan National Tower
Lansing, Michigan 48933
Telephone: (517) 482-5800

Andrew K. Light
James H. Hanson
Lynne D. Lidke
Scopelitis, Garvin, Light & Hanson, P.C.
1777 Market Tower
Ten West Market Street
Indianapolis, IN 46204
Telephone: (317) 637-1777

Daniel R. Barney
Robert Digges, Jr.
Cynthia Tripi
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4677
Telephone: (703) 638-1865

Attorneys for Plaintiffs in Troy Cab
John L. Collins (P12065)
Robert E. McFarland (P17394)
Gary J. McRay (P17554)
Kathryn M. Niemer (P34234)
FOSTER, SWIFT, COLLINS & SMITH
32300 Northwestern Highway
Suite 230
Farmington Hills, MI 48334
Telephone: (810) 851-7500

Attorneys for Defendants
Don L. Keskey (P23003)
Henry J. Boynton (P25242)
David M. Gadaleto (P30163)
Tonatzin M. Alfaro Garcia (P36542)
Department of Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 334-7650

Attorneys for Plaintiffs in Westlake
Karl L. Gotting (P14220)
Catherine A. Jacobs (P32996)
Loomis, Ewert, Ederer, Parsley,
Davis & Gotting, P.C.
232 South Capitol Ave, Suite 1000
Lansing, MI 48933-1525
Telephone: (517) 482-2400

Attorneys for Intervening Plaintiffs in Westlake
Iris K. Socolofsky-Linder (P31673)
Michael S. Ashton (P40474)
Fraser, Trebilcock, Davis & Foster, P.C.
1000 Michigan National Tower
Lansing, Michigan 48933
Telephone: (517) 482-5800

Andrew K. Light
James H. Hanson
Lynne D. Lidke
Scopelitis, Garvin, Light & Hanson, PC
1777 Market Tower
Ten West Market Street
Indianapolis, IN 46204
Telephone: (317) 637-1777

Daniel R. Barney
Robert Digges, Jr.
Cynthia Tripi
ATA Litigation Center
2200 Mill Road
Alexandria, VA 22314-4677
Telephone: (703) 638-1865

Attorneys for Plaintiffs in Troy Cab
John L. Collins (P12065)
Robert E. McFarland (P17394)
Gary J. McRay (P17554)
Kathryn M. Niemer (P34234)
FOSTER, SWIFT, COLLINS & SMITH
32300 Northwestern Highway, Suite 230
Farmington Hills, MI 48334
Telephone: (810) 851-7500

Attorneys for Defendants
Don L. Keskey (P23003)
Henry J. Boynton (P25242)
David M. Gadaleto (P30163)
Tonatzin M. Alfaro Garcia (P36542)
Department of Attorney General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
Telephone: (517) 334-7650

SUPPLEMENTAL AFFIDAVIT OF TIMOTHY J. YUNGFER

Timothy J. Yungfer, being first duly sworn, deposes and says as follows:

1. Affiant filed a previous Affidavit signed September 14, 1995, in the above captioned matter which inadvertently omitted that the statements were made on personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

2. Also omitted from my original Affidavit signed September 14, 1995 was Attachment "B" referenced in paragraph 15 which shows appropriations received and expended by the Motor Carrier Division of the Department of State Police since 1991-1992 fiscal year. Attachment "B" is included with this Supplemental Affidavit.

3. Affiant has reviewed the contents of the Affidavit signed on September 14, 1995, and states affirmatively that the contents of the Affidavit are made on Affiant's personal knowledge, and that if sworn as a witness, Affiant can testify competently to the facts stated in the Affidavit.

Further, Affiant sayeth not.

_____
Timothy J. Yungfer

Subscribed and sworn to before me
this 20th day of September, 1995.

_____
Carol Ann Dane, Notary Public
Eaton County, Michigan
My Commission Expires: 05/05/96

Prepared by Paul Walters 9/19/95

		Prorated Expenses*		
Fiscal Year	Appropriated Motor Carrier Fees	General Enforcement	Safety Inspections	Unexpended Motor Carrier Fees
1991/92	2,484,100	2,252.641	149,840	81,619
1992/93	2,484,100	2,323.966	143,234	16,900
1993/94	2,553,700	2,158,607	146,535	250,553
1994/95	2,571,400	2,332,703	144,864	93,833
1995/96	2,664,100			

*Fiscal Year 1994/95 are projected through year end.
Expenses are prorated to percentage of funding from Motor Carrier Fees attributable to the General Enforcement and Safety Inspection Programs